Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1013
No. 83-1373

IN THE

Supreme Court of the United States

October Term, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR STATE OF NEW YORK *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

ROBERT ABRAMS
Attorney General of the State of New York
Attorney of Record
The Capitol
Albany, NY 12224
(518) 474-1968

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions
JAMES A. SEVINSKY
Assistant Attorney General
In Charge
KATHLEEN LISTON MORRISON
Assistant Attorney General
of Counsel

BEST AVAILABLE COPY

Question Presented for Review.

Whether the Court of Appeals for the Third Circuit correctly held that Section 301(1) of the Clean Water Act, 33 U.S.C. § 1311(1) prohibits the United States Environmental Protection Agency from granting variances from national pretreatment standards for toxic pollutants to indirect dischargers.

Page

Table of Contents.

	Page
Question Presented for Review	i
Opinion Below	2
Jurisdiction	2
Statutes and Regulations Involved	2
Interest of *Amicus Curiae*	3
Statement of the Case	4
Summary of Argument	5
ARGUMENT:	
Section 301(1) of the Clean Water Act prohibits the issuance of FDF variances for indirect dischargers of toxic pollutants	6
CONCLUSION. For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit should be affirmed	11

Page

TABLE OF AUTHORITIES.

	Page
CASE:	
E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 (1977)	9
STATUTES:	
40 C.F.R. § 403.13 (1983)	3
Clean Water Act:	
Section 301(1), 33 U.S.C. § 1311(1) (1982)	2
Section 301(b), 33 U.S.C. § 1311(b) (1982)	2
Sections 310(c) and (g), 33 U.S.C. § 1311(c) and (g) (1982)	2
Section 304(b), 33 U.S.C. § 1314(b) (1982)	2
Section 307(b), 33 U.S.C. § 1317(b)	2
33 U.S.C. §§ 1251 *et seq.*	3, 4
28 U.S.C. § 1254(1)	2
OTHER AUTHORITY:	
A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. (1978)	10

Nos. 83-1013 and 83-1373

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,

Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for State of New York *Amicus Curiae*.

Opinion Below.

The opinion of the Court of Appeals for the Third Circuit is reported at 719 F.2d 624.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 20, 1983. The petition for a writ of certiorari in No. 83-1013 was filed on December 19, 1983. By order dated December 12, 1983, Justice Brennan extended the time to file a petition for a writ of certiorari in No. 83-1373 until February 17, 1984, and the petition was filed on that date. The petitions were granted, and the cases were consolidated on April 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved.

This case involves technology-based "pretreatment standards" under Section 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b) (1982). Section 301(b) of the Act, 33 U.S.C. § 1311(b) (1982), describes various effluent limitations and standards that dischargers of pollutants are required to achieve. The factors that the Environmental Protection Agency Administrator must consider in establishing effluent limitations and standards are set forth in § 304(b) of the Act, 33 U.S.C. § 1314(b) (1982). Sections 301(c) and (g) of the Act, 33 U.S.C. § 1311(c) and (g) (1982), authorize modifications of some of the § 301 limitations and standards. Section 301(l) of the Act, 33 U.S.C. § 1311(l) (1982), provides that the Administrator may not modify the requirements of § 301 for toxic pollutants.

The EPA regulation at issue in this case governing the establishment of "fundamentally different factors" ("FDF") variances is codified at 40 C.F.R. § 403.13 (1983), and in 1984 was amended to reflect the decision of the court below (49 F.R. 5132, Feb. 10, 1984).

Interest of *Amicus Curiae*.

When the Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, it provided for a national scheme to improve the nation's water quality. While the States remain free under the Act to promulgate stricter standards should they choose to do so, they remain dependent upon the United States Environmental Protection Agency ("EPA") to promulgate baseline national effluent limitations. When EPA creates an unauthorized variance procedure, Congress' intent that there be baseline uniformity in regulating discharges is denied. This frustrates the water quality goals of the Act, does violence to the federal-State partnership envisioned by Congress, creates economic inequities by giving some plants economic advantages over others, and carried to the extreme, promotes interstate conflict.

New York, like 30 other States, is not authorized by EPA to administer the fundamentally different factor ("FDF") variance EPA created for indirect dischargers of toxic pollutants. In addition, under EPA's regulations, New York and 30 other States have no formal role when a discharger requests a variance from EPA; they may not even be aware of the request. EPA's never-ending decision-making process on FDF variances for toxic pollutants operates as a disincentive to the timely installation of pollution control devices because plants applying for the variance defer such expenditures in the hope they may qualify for a variance and thus cut costs.

Such inequities, the State of New York suggests, were not only not contemplated by Congress in enacting and amending the Clean Water Act, but are contrary to Congress' intentions.

This brief is therefore submitted in support of the position urged by the respondent, the Natural Resources Defense Council, Inc. seeking affirmance of the decision below of the Third Circuit Court of Appeals.

Statement of the Case.

The Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, requires the United States Environmental Protection Agency to regulate two types of industrial dischargers: (1) "direct" dischargers, who discharge their wastewater directly into navigable waters, and (2) "indirect" dischargers, who discharge into municipally operated, publicly-owned treatment works, which in turn discharge their collective wastewaters into navigable waters. For both types of dischargers, EPA conducted rulemaking proceedings and promulgated national technology-based requirements applicable to categories of dischargers (e.g., metal finishing, electroplating). In each rulemaking proceeding, EPA inventoried industrial plants to gather information about the types and quantities of pollutants in a typical plant's wastewater and the costs and effectiveness of various wastewater treatment technologies prior to promulgating regulations.

EPA also, however, included a provision allowing an atypical plant to obtain a variance from the limits in a categorical standard where the plant made a satisfactory showing of factors "fundamentally different" from those considered by EPA in promulgating the regulations. This "fundamentally different factor" variance is theoretically

available to lower as well as raise a plant's limits (although there are no indications in the record of requests to lower the limits) and is available not only upon the request of a plant, but of "any interested person", including EPA (40 C.F.R. § 403.13(b)).

The variance mechanism is somewhat cumbersome. New York and 30 other States are not authorized by EPA to grant or deny requests for variances from the pretreatment standards. Variance requests must be filed with the EPA, and the public is invited to comment (40 C.F.R. § 403.13(g), (j)). The EPA Enforcement Division Director then decides whether to grant or deny the variance (40 C.F.R. 403.13(1)). After his decision is issued, any interested person may petition the EPA Regional Administrator for a hearing within 30 days of the EPA Enforcement Division Director's decision (40 C.F.R. § 403.13(m)(1)), and if the petition is denied, the denial may be appealed to the EPA Administrator himself (40 C.F.R. § 403.13(m)(2)).

Experience has shown that once a plant files for an FDF variance, compliance with the Clean Water Act is deferred to some uncertain future date. Some applications, still undecided, date from 1976. Not surprisingly, while this process is going on, plants are unwilling to make substantial capital investments in expensive pollution control devices because there exists the hope that a variance will be issued and that the expenditure may not be necessary.

Summary of Argument.

By its express terms, Section 301(1) of the Clean Water Act prohibits the issuance of a variance for indirect dischargers of toxic pollutants. It is reasonable to assume that Congress, which expressly included several provisions authorizing variances relating to conventional, *i.e.*, non-

toxic, pollutants in other sections of the Clean Water Act, enacted the prohibition barring variances for toxic pollutants in Section 301(l) because it chose to treat toxic pollutants differently.

EPA's argument that the ban against variances applies to some variances but not to the FDF variances at issue is inconsistent with the broad language of the ban and Congress' historic treatment of toxic pollutants under the Clean Water Act.

EPA's argument that the ban must be read flexibly in its favor or, conversely, rigidly to prohibit any amendment or revision of effluent limitations or standards in the absence of rule-making must be rejected because a reasonable construction which accords with the statute's express terms and intent is available.

ARGUMENT.

Section 301(1) of the Clean Water Act prohibits the issuance of FDF variances for indirect dischargers of toxic pollutants.

Section 301(1) of the Clean Water Act was enacted by Congress in 1977 and provides:

> The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this title.

This is in stark contrast to Sections 301(c) and (g) of the Clean Water Act which expressly authorize variances:

(c) The Administrator may modify the requirements of subsection (b) (2) (A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

• • •

(g) (1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b) (2) (A) of this section with respect to the discharge of any pollutant (*other than* pollutants identified pursuant to section 304(a) (4) of this title, *toxic pollutants* subject to section 307(a) of this title, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b) (1) (A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection. (Emphasis added).

Had Congress wished to authorize a variance from toxic pollutants for indirect dischargers, it certainly had the opportunity. Instead, it chose to prohibit such variances and plainly said so. The Third Circuit had no difficulty with this rationale. As that Court pointed out, Congress has always treated toxic pollutants specially under the Act (719 F.2d at 645). Indeed, the ban against variances for toxic pollutants is the only express ban against variances in the entire Act.

The reasoning this Court applied in *E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 138 (1977) is equally appropriate here:

> *In striking contrast to § 301(c), there is no statutory provision for variances, and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and "maximum feasible control of new sources."* 430 U.S. at 138 (emphasis added).

Congress' intention to insure national uniformity is counter-manded by creation of an FDF variance.

EPA's argument that the ban against variances for toxic pollutants applies not to FDF variances but only to those authorized by Sections 301(c) and (g)—based on economics or the high quality of waters receiving the discharge—is belied by the broad terms of the prohibition in Section 301(1). It is nothing more than an argument of convenience for the administrators and does not reflect Congress' intention—or most obviously—Congress' words.

EPA's argument that a "literalistic" reading of the ban would mean that EPA could never revise effluent limitations and pretreatment standards for toxic pollutants even if it discovered errors in its analysis goes too far. The ban does not prohibit EPA from amending or revising nationally-uniform limitations or standards within a rulemaking context; such amendments or revisions would still provide for national uniformity, rather than for case-by-case exceptions administered on a regional rather than national basis, some by mere default for years, as the FDF variance procedure does now.

New York strongly disagrees with EPA's argument that a rule-making proceeding and the FDF variance procedure would achieve the same substantive result. Rule-making achieves national uniformity in accordance with the goals of the Clean Water Act, while individual plant-by-plant determinations made by regional, not national, EPA personnel under the FDF variance procedure do not.

It is significant that Senator Edmund S. Muskie, acknowledged by this Court in *du Pont* as "perhaps the Act's primary author" (430 U.S. at 129) used the terms "modification" and "variance" interchangeably during the Senate floor debate, on the 1977 amendments (A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. [1978]). His understanding of the meaning of the term "modification", and his explanation to his colleagues, who presumably relied upon it, is clear: modification means variance, not rule-making. And as this Court also stated in *du Pont,* Senator Muskie also "emphasized the importance of uniformity in setting § 301 limitations. He explained that this goal of uniformity required that EPA focus on classes or categories of sources in formulating effluent limitations" (430 U.S. at 129). EPA's FDF variances which create plant-by-plant rather than categorical exceptions are inconsistent with Senator Muskie's representations. Senator Muskie's statements, given his unique role in obtaining passage of the legislative provisions at issue here, are entitled to significant weight. Thus, EPA's argument that a literal interpretation is required should be rejected because it would lead to an unreasonable result, and that would be inconsistent with elementary principles of statutory construction.

CONCLUSION.

For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit should be affirmed.

Dated: August 20, 1984

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney of Record
The Capitol
Albany, New York 12224
(518) 474-1968

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

JAMES A. SEVINSKY
Assistant Attorney General
in Charge

KATHLEEN LISTON MORRISON
Assistant Attorney General
of Counsel